Editor's note: 79 I.D. 6; Appealed -- rev'd, sub nom. United States v. Wharton, Civ. No. 70-106 (D. Oreg. Feb. 26, 1973), Dist. Ct. rev'd, Nos. 73-2732, 72-2831 (9th Cir. March 18, 1975) 514 F.2d 406. Department had initiated action to remove the Wartons from the land. Court action was held in abayance pending actions on Warton color-of-title application. The Circuit court upheld the Board, but found the Gvt. estopped from ejecting the Wartons.

MINNIE E. WHARTON, JOHN W. WHARTON, RUTH WHARTON JAMES, CARROLL WHARTON, IRIS WHARTON BARTYL, MARVIN WHARTON, THOMAS WHARTON, BETTY WHARTON ZINK, FAYE WHARTON PAMPERIEN, and SAMUEL WHARTON

IBLA 72-162 Decided February 2, 1972

Appeal from decision (OR 8041) by Oregon state office, Bureau of Land Management, rejecting color of title application.

Affirmed.

Color or Claim of Title: Generally

The purpose and intent of the Color of Title Act, 43 U.S.C. §§ 1068, 1068a, 1068b (1970) is to provide a legal method whereby citizens, relying in good faith upon title or claim derived from some source other than the government, and who have continued in peaceful, adverse possession of public land for the prescribed period of 20 years and had made valuable improvements, or have reduced some part of the land to cultivation, might acquire title thereto. However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not in good title.

Color of Claim of Title: Generally

One who has not reached his majority (i.e. is a minor) may acquire title by adverse possession. However, he must show that he claims the land as against everyone. If he resides on the land with his mother, who has knowledge of the defective title, he is chargeable with that knowledge.

Color or Claim of Title: Good Faith

Good faith in adverse possession requires that a claimant honestly believed there was no defect in his title and the Department may consider whether such belief was unreasonable in the light of the facts then actually known or available to him. Once it is established that the claimant knew that the land was owned by the government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has no title or fails to demonstrate a rationally justifiable reason for believing that he had title.

APPEARANCES: Keith Burns for appellants.

OPINION BY MR. FISHMAN

The above named parties have appealed jointly from a decision of the Oregon state office, Bureau of Land Management, dated October 22, 1971, which rejected their color of title application, OR 8041, filed pursuant to the Act of December 22, 1928, as amended, 43 U.S.C. 1068, 1068a, 1068b (1970).

The applicants had filed a Class I application under that Act on May 25, 1971, for the SW 1/4 NW 1/4 sec, 21, T. 21 S., R. 38 E., W.M. Oregon, embracing 40 acres. The decision below recited the following facts: Curtis Wharton, husband of Minnie E. Wharton Carlson, and father of the other applicants, made application for the land in issue on September 26, 1919, under the Desert Land Act, as amended, 43 U.S.C. §§ 321-329 (1970). His application was allowed on January 12, 1921. The family had lived on and cultivated the land prior to the filing of the desert land application. Curtis Wharton failed to file final proof or make final payment, resulting in the cancellation of his entry on January 23, 1930. He died in 1949. The applicants are purportedly the legal heirs of the deceased. They claim no knowledge of the desert land entry cancellation until some time in 1955 when Minnie Wharton asserts she first learned the land was still owned by the federal government. They further assert that John Wharton (son of Curtis Wharton)

first learned in 1957 that the family had no deed to the land. Curtis Wharton began cultivating the land prior to 1919 and the family continuously kept the land under cultivation until 1966. Improvements to the land included a house, shed, fence, two wells, and electrical power facilities. John Wharton was born on the land in 1933 and lived there until 1966.

Other than the assertion that all individuals involved are the legal heirs of Curtis Wharton, the color of title claim is based on the following assertions: Minnie E. Wharton Carlson held the land in peaceful adverse possession in good faith from 1930 (the date of the cancellation of the desert land entry) until 1955 when she was notified of ownership by the federal government -- a period of well over 20 years. John Wharton assertedly held the land in peaceful adverse possession in good faith from 1933, the date of his birth, to 1957, when he recognized the family had no deed, a period of 24 years. The other applicants were born on the land and lived there until they were emancipated. The appellants also based their claim on the placing of valuable improvements on the land.

The decision below concedes that the improvement or cultivation requirements of the statute have been met. However, that decision

predicates its rejection on the basis that the appellants have not submitted the crucial element, i.e., a document or evidence of title to the lands upon which a color of title claim could be sustained. It also finds that the appellants were not in good faith because investigations revealed that there are no records indicating payment of any taxes on the land in issue. Also the Malheur County recorder advised appellants' attorney by letter of April 12, 1971, that "the United States is title holder to this property; there have been no conveyances." The decision also questions the good faith of the parties since Minnie E. Wharton had knowledge of the desert land entry and the original ownership of the land, as manifested by her signature upon original documents in the desert land entry file, The Dalles 025534, i.e., "Declaration of Applicants", "Affidavits" as to survey and water rights in 1919, and "Testimony of Witness" for the yearly proof in 1923. The decision also recites that a letter to the Bureau of Land Management, dated January 4, 1956, from Mrs. Wharton, contained in the desert land entry file, indicates she had earlier knowledge of the federal title to the land. The decision quotes her as saying, "I wrote to you in December 1954, to find out what to do and how much it would cost to get a deed for this place . . .". Her letter of January 4, 1956, also stated:

> I am again writting [sic] you in regards [sic] to the Old Desert Land Entry made by Curtis Wharton . . . [which] was never completed. And he passed away in August 1949 as I wrote you before we made our home on the place since the Early 20ies [sic] and are still making the place our home. The Entry no. 025534. For SW 1/4 North W. 1/4 section 21 T. 21 SR 3 8 E.W.M.
>
> I was advised I could file on this place and prove up as soon as I could put it through. . . . I wrote you in Dec. of 1954 to find out what to do and how much it would cost to get a deed for this place. Then during the summer of 1955 I had The Bureau of Land Management at Vale, Oregon write you. . . . We can't go ahead with the place untill [sic] we can get a deed for it. I have put in over 20 years on this Place and should be entitled to a deed or at least a chance to file on the place and then prove up. But have never recieved [sic] even blanks to file on the place. Or found out what it would cost to file and prove up. . . . As we want to build a home. But if we can't deed the place we are not going to put any more money on the place. Hopeing [sic] to hear from you in the near future. [Emphasis supplied]

In their appeal the appellants assert that there is no question that they held the land in peaceful adverse possession, since they and their ancestor, Curtis Wharton, have lived on the land continuously from before 1919 until recently. They express their disagreement with the finding of the decision below that a document or evidence of title to the lands is an indispensable ingredient upon which a color of title claim must be predicated.

They concede that they have no such documents and argue that the law does not require them. They assert that they had title to the land because they knew Curtis Wharton had entered it under the Desert

Land Act, and, since they had remained on the land for a long period of time, they conclude that they had reason to believe the claim was perfected.

They also challenge the finding of the decision below that they have not shown good faith. They argue that the mere fact that there are not records indicating payments of any taxes on the land is irrelevant since the law does not require the payment of taxes under a Class I claim. They point out that only a claim based on Class II, which was added to the statute in 1953, requires evidence of such payments.

They further assert that they should not be presumed to know the county records, more specifically, the statement contained in the Malheur County recorder's office showing the land to be public land. They assert that they believed they had a valid claim to the land and therefore had no reason to check the county records. They also controvert the statement quoted from Minnie Wharton's letter of March 15, 1955, and assert that she did not therein recognize federal title to the land, suggesting that all she sought by that letter was the physical indicium of title. They further assert that until she received the letter from the Bureau of Land Management on March 15, 1955, she had not realized that their occupancy of the land was in trespass and that there was no way of securing documents of title. They also challenge

the finding of the decision below that: "the applicants cannot include periods of time beginning prior to 1949 . . .", i.e., prior to the death of Curtis Wharton. Applicants assert their belief that they can include time prior to that event, since they lived on the land prior to that time, and, therefore, claim the land in their own right as well as his heirs. They point out that there is a pending lawsuit by the United States in the United States District Court for the District of Oregon, Civil No. 70-106, to take possession of the land involved in this case. A deposition of Curtis Wharton in that proceeding indicates that he believed that it was their land because he was born "right on the place and all of my brothers and sisters -- and there is [sic] nine of us. And we were born right there and lived there until we was -- got away from home." [sic]

We now proceed to consideration of the arguments advanced by the appellants.

It is well established that a claim or color of title must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title. Peterson v. Weber County, 99 Ut. 281, 103 P.2d 652, 655 (1939); See Karvonen v. Dyer, 261 F.2d 671, 674 (9th Cir. 1958) and Henry D. Warbasse, Eugenia W. Warbasse, A-30383 (August 19, 1965).

As was pointed out in Pacific Coast Co. v. James, 5 Alaska 180, aff'd, 234 F. 595 (1916), "[o]ne cannot make his own title."

The purpose and intent of the Color of Title Act was to provide a legal method whereby citizens relying in good faith upon title or claim derived from some source other than the federal government 1/ , who had continued in peaceful, adverse possession of public land for the prescribed period and had made valuable improvements, or had reduced some part of the land to cultivation, might acquire title thereto. Ralph Findlay, A-23522 (February 23, 1943). However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not a good title. William Benton, A-23258 (November 14, 1942). See Jacob Dykstra, 2 IBLA 177 (1971); Cf. Hugh Manning, A-28383 (August 18, 1960).

Good faith, in adverse possession, requires that a claimant 2/ honestly believed the land was owned by him. In determining whether

1/ See Bernard J. and Myrle A. Gaffney, A-30327 (October 28, 1965), stipulated dismissal without prejudice, January 17, 1969, Bernard J. Gaffney and Myrle A. Gaffney v. Stewart Udall, Civil No. 3-66-22 (D. Minn.).

2/ The Department adheres to the view that a color of title applicant must show that the occupation of the land was founded on a reasonable basis for the belief that he and his predecessors in interest had title to the land. Hugh Manning, supra; Marion M. Pontius, A-27473 (November 7, 1957); Clyde A. Phillebaum, A-25933 (November 8, 1950); F. C. French, A-25924 (October 20, 1950).

the claimant honestly believed that there was no defect in his title, the Department may consider whether such belief was unreasonable in the light of the facts then actually known to him. See Jones v. Arthur, 28 L.D. 235 (1899).

However, once it is established that the claimant knew the land was owned by the federal government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has no title. Dennis v. Jean, A-20899 (July 24, 1937), citing Deffeback v. Hawke, 115 U.S. 392 (1885). An applicant under the Act must show a rationally justifiable reason for believing that he owned the land. See Myrtle A. Freer et al., 70 I.D. 145 (1963).

It has also been held that the period of adverse occupancy subsequent to discovery that the tract is public land is not in good faith and may not be counted towards meeting the statutory 20-year occupancy requirement. Ephraim R. Nelson, A-25865 (June 6, 1950). The factor of good faith of the applicant himself is essential to the issuance of patent under the statute. Anthony S. Enos, 60 I.D. 329 (1949). See Lester J. Hamel, 74 I.D. 125, 129 (1967), aff'd, 226 F. Supp. 96 (N.D. Cal. 1963).

Where one person enters upon land in recognition of title of another, in order for the occupant to prevail under the doctrine of

adverse possession it must be established that there was a repudiation of the relationship established and claim of title adversely to that of the titleholder, and repudiation and adverse claim must be clearly brought home to the titleholder, since the record of adverse possession will only begin to run from the time of notice of repudiation and if the adverse claim has been brought home to the titleholder. Killough v. Hinds, 338 S.W. 2d 707, 710 (Tex. 1960). See POWELL, THE LAW OF REAL PROPERTY, § 1022 (1971). Cf. Johnson v. Szumowicz, 63 Wyo. 211, 179 P.2d 1012 (1947).

An adverse possession based entirely on a mistaken belief that the tract is embraced within one's own holdings is inadequate under the law, since it lacks the basic element of a claim or title derived from some source other than the United States. John Johnson, A-25695 (December 30, 1949). See Christopher A. Merlau, A-26204 (December 18, 1951).

Applying the law to the facts of the case at bar, it seems crystal clear that the appellants had no rational basis for believing that they owned the land in issue. It strains our credulity to believe that the desert land entryman, Curtis Wharton, was so secretive about his personal affairs that his wife, Minnie E. Wharton (now Minnie E. Wharton Carlson) was unaware of the cancellation of the desert land entry. In any event, by her filings in the desert land entry case it clearly is established that she knew the land was public land and she had no basis for believing that the situation had changed. She and the other appellants

stand in the shoes of Curtis Wharton. In Springer v. Young, 14 Or. 280, 12 P. 400, 403 (1886), the court said:

> It must be apparent that George W. Springer could not have retained the title to this land against the claim of this plaintiff, so far as yet appears; and, if he could not, neither can the defendants, who have or claim no other interest therein than such as descended to them as heirs at law of their father, George W. Springer. They stand in the shoes of their ancestor. They take the title which the law casts upon them, affected with the same trusts and equities as it was when their ancestor held it.

See Whitcomb v. Provost, 102 Wisc. 278, 78 N.W. 432, 433 (1899). Cf. Edward T. Harris, A-27785 (January 19, 1959).

In Minnie Wharton's letter of January 4, 1956, to the Bureau of Land Management she stated that she ". . . should be entitled to a deed or at least a chance to file on the place and then prove up . . ." She complained that she never ". . . found out what it would cost to file and prove up." If the letter is not deemed to be a recognition of federal ownership of the land, at the very least it signifies an awareness that title conceivably could be in federal ownership. In any event, Springer supra, makes her late husband's knowledge attributable to her and the other appellants and also makes clear that "Neither husband nor wife can hold, adversely to each other, premises of which they are in the joint occupancy as a family." Id. at 404. Moreover, in the absence of record title in a claimant, persons who occupy premises of which they are purportedly joint owners are not ordinarily considered in adverse possession against each other. 82 A.L.R.2d 44n (1962). It follows that Minnie Wharton's occupancy until Curtis Wharton's death in 1949 was not an adverse holding and that

their children cannot maintain a claim adverse to their father until his death. Curtis Wharton, by filing the desert land application, recognized the federal ownership of the land in issue. Minnie Wharton, by virtue of her participation in the desert land entry proceedings, also recognized the paramount federal title. Their posture is similar to that of a tenant vis-a-vis his landlord. In Catholic Bishop v. Gibbon, 158 U.S. 155, 170 (1895), the Supreme Court stated as follows:

> . . . But lessees under a claimant or occupant, holding the property for him and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease [or of desert land entry] implies, not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease [or entry]. They, therefore, whilst retaining possession are estopped to deny his rights.

See AM JUR 2d, Landlord and Tenant § 109. Moreover, there is authority to the effect that a tenant may not set up adverse title in himself after the termination of the lease without surrendering possession. Id. § 120. See Springer v. Young, supra at 403-404.

We next proceed to consider the claim of the appellants other than Minnie Wharton. Their contention that, by virtue of having been born on the land in issue and having lived there for many years, they held the land in good faith in adverse possession is not persuasive.

Their father, who had recognized federal title by seeking to acquire the land under the desert land laws, died in 1949. His recognition binds them. See Springer v. Young, supra. As indicated, earlier, the appellants, other than Minnie Wharton, ". . . claim the land in their own right as well as his [Curtis Wharton's] heirs."

It does not comport with reason that John Wharton, who was born on the land in 1933 and purportedly lived there until 1966 was, in his childhood, aware of, or concerned with, the ownership of the land. To suggest that he, in 1933 or shortly thereafter, as a baby or young child, was holding the land in open notorious adverse possession, suggests a faculty for comprehension in a baby or young child which flies in the face of reason. The fact that the other appellants, apart from Minnie E. Wharton and John W. Wharton had been born on the land and lived there until they were emancipated, simply does not lend any persuasive force to the assertion that they held the land in open notorious adverse possession.

We recognize the existence of authority for the proposition that one who has not reached his majority may acquire title to land by adverse possession, 3 AM JUR, Adverse Possession § 131. However, there must be an intention to disseise. In Bradstreet v. Huntington, 9 U.S. (5 Pet.) 399, 409 (1831) the Supreme Court illuminated this concept as follows:

> An infant, a feme covert, a joint tenant in common, a guardian, and even one getting possession by fraud, may be a disseisor. . . .
>
> The whole of this doctrine is summed up in very few words, as laid down by Lord Coke, [1 Inst. 153] and recognized in terms in the case of Blunden and Baugh, 3 Croke [sic], 302, in which it underwent very great consideration. Lord Coke says: "A disseisin is when one enters intending to usurp the possession, and to oust another of his freehold; and therefore querendum est a judice quo animo hoc fecerit, why he entered and intruded." So the whole inquiry is reduced to the fact of entering, and the intention to usurp possession. These are the elements of actual disseisin; and yet we have seen that one may become a disseisor, though entering peaceably under a void deed, or a void feoffment, or by fraud. . . .

In the light of Springer and cases cited in 82 A.L.R.2d 44n, the heirs of Curtis Wharton cannot be regarded as holding the land in adverse possession since they lacked "the intention to usurp possession" as against Mrs. Wharton. Their claim is not adverse to Minnie Wharton who claimed the land until 1955; her knowledge of the defective title binds them.

In sum, the claim of the appellants cannot be recognized since (1) there is an absence of color of title, (2) their claim is not derived from a source other than the United States, (3) their asserted possession did not constitute a repudiation of title in another, (4) their ancestor, Curtis Wharton, had recognized federal title and they stood in his shoes, and (5) they cannot demonstrate a good faith holding of the land.

Although the appellants point out that payment of taxes is not a prerequisite for a Class I claim, the failure to show payment of taxes at any time during the asserted adverse possession in good faith is certainly an element which casts great doubt upon the asserted good faith of the appellants. The assertion of claimed ownership of land in good faith is negated by the failure to pay taxes therefor for several decades.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Douglas E. Henriques, Alternate Member.